Filed 5/18/10 In re J.A. CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| In re J.A., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>J.A.,<br><br>Defendant and Appellant. | C061881<br><br>(Super. Ct. No. 65834) |

Minor J.A., age 17, admitted that he came within the provisions of Welfare and Institutions Code section 602 in that he committed second degree robbery.[1] (Pen. Code, §§ 211, 212.5, subd. (c).) In exchange, three related counts, two unrelated counts, and four personal knife use allegations were dismissed

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

with a *Harvey* waiver.[2] The minor was committed to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF).

On appeal, the minor contends (1) the DJF commitment was an abuse of discretion, (2) the court erred by failing to pronounce orally the facts and circumstances it used to determine the maximum term of physical confinement, and (3) probation conditions imposed by the court should be stricken; the Attorney General concedes this last point. We shall modify the judgment.

## FACTS[3]

***Prior First Degree Burglary (Dismissed per DEJ)***

In February 2008, the minor was placed in the deferred entry of judgment (DEJ) program regarding his involvement in a first degree burglary. On February 26, 2009, the juvenile court determined that the minor had successfully completed the program and dismissed all charges.

***February 23, 2009, Robbery (Dismissed with Harvey Waiver)***

On February 23, 2009, three days before the prior charges were dismissed, victim A.S. and his friend A.L. were walking down a street and were approached by three people riding bicycles. One rider asked to use A.S.'s cellular telephone; A.S. replied that the phone was at his residence. The rider

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[2] *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

[3] Because the matters were resolved without contested hearings, our statements of fact are taken from the probation officer's disposition report (social study).

then asked A.S. if he had any money. Before A.S. could answer, the rider grabbed A.S. around the neck and placed a knife to A.S.'s throat. The rider identified himself as a Norteño, removed A.S.'s backpack, and told a second rider to "go through" A.S.'s pockets. The second rider patted A.S.'s pockets and removed a cellular telephone and a music player from A.S.'s clothing. The third rider stood and observed the actions of the other two riders. After the robbery, all three bicyclists rode away.

A.S. showed a responding officer seven to 10 small cut marks on the front of his neck that resulted from the knife being held against his throat. A.L. identified the rider who had removed the cell phone from A.S.'s pocket as F.M., the brother of a girl he had dated. A.L. identified the minor as the person responsible for taking the music player. The person holding the knife to A.S.'s throat was never identified.

***March 2, 2009, Robbery***

On March 2, 2009, J.S. was robbed at knifepoint as he walked home from school. As J.S. was standing on a street corner, 17-year-old R.J. approached him from behind, put a knife to his throat, and said, "'Don't move, or I'll kill you.'" R.J. then told the minor to remove everything from J.S.'s pockets. The minor took a cellular telephone and money from J.S.'s pockets and removed a backpack from J.S.'s shoulders. The minor and R.J. then fled. J.S. recognized the minor as a school classmate.

Responding officers proceeded to a known hangout where they located the minor, R.J., F.M., and a fourth youth, C.R. Upon searching the youths and their surroundings, officers located all of J.S.'s belongings and found two knives in the area where R.J. was standing. At an in-field showup, J.S. positively identified the minor as the person who had taken items from his pockets. J.S. identified R.J. as the person who had put the knife to his throat.

## DISCUSSION

### I.

The minor contends the juvenile court abused its discretion when it committed him to DJF. Specifically, he claims (1) a comparison with other cases makes plain that discretion was abused, and (2) the disposition report (social study) was inadequate in that it failed to identify particular DJF programs from which he could benefit and failed to state why a less restrictive placement was inappropriate. Neither point has merit.

***Background***

In March 2009, the probation department filed a disposition report recommending that the minor be committed to DJF. The report explained: "The minor was shown leniency the first time he appeared before the Court. He was placed on [DEJ] and all charges were eventually dropped. Unfortunately, the minor did not appreciate the opportunity the Court offered him, and instead, he went on to commit a more serious crime - a crime that is listed in [Welfare and Institutions Code]

Section 707(b)[]. The minor was an active participant in a violent crime that not only violated the victim's personal rights, but also caused him to fear for his life." The report recommended that the minor be committed to DJF "where he can obtain the services necessary to become a productive member of society."

The report stated: "In regard to an appropriate disposition, the minor stated that he would like to be released to his brother [a military policeman] so that he can follow in his footsteps. *The minor said he will not accept being sent to a placement facility and that all he will do is run if he is sent to placement*." (Italics added.)

At the disposition hearing in April 2009, the juvenile court declared the minor's offense to be a felony and adjudged him a ward of the court. Defense counsel requested a contested hearing to challenge probation's recommendation of DJF.

At the contested hearing in May 2009, defense counsel asked the court to suspend the DJF commitment and to send the minor to a one-year camp. Counsel noted that the minor had admitted his involvement in the March 2, 2009 robbery, although he still denied knowing that a coparticipant had used a knife. Counsel urged that the minor had expressed remorse and was not a gang member, even though he "has friends who are gang members."

Counsel stated that his investigator had interviewed victim J.S., who "admitted that he never saw a knife, but he inferred that there was a knife," because the suspect wrapped an arm around J.S.'s neck, placed an object to his throat, and said,

"'Don't move or I'll kill you.'" Counsel argued that photographs of J.S.'s neck show "a mark on his neck; however, it would be ambiguous [*sic*] to know whether it was caused by a knife or some other contact with him." Counsel did not point to any affirmative evidence that a knife had *not* been used.

Counsel acknowledged that the disposition report recommended DJF, but he argued there was "nothing in the report that shows any finding that it would be advantageous to him as far as rehabilitation." Counsel did not dispute the report's statement that at DJF, the minor "can obtain the services necessary to become a productive member of society."

Counsel urged that, although the minor had been granted DEJ for a prior felony offense, the present matter was "in essence a first offense" because the minor had been released from DEJ a few days before the March 2, 2009 robbery.[4]

Counsel proposed that the minor's brother, a military police officer, could return to California and intervene in the minor's life; alternatively, the minor could live with his father in Corning. The minor's father testified that the minor could "come out there and stay with" him.

In rebuttal, the prosecutor introduced two photographs of victim J.S.'s neck showing knife wounds. The prosecutor emphasized that the minor had participated in two brazen armed

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[4] This argument did not address the February 23, 2009, robbery, dismissed with a *Harvey* waiver, which had occurred *before* the minor was released from DEJ.

robberies using the same modus operandi. He urged the court to consider community safety when it made its ruling.

Defense counsel responded that the community could be protected if the minor were placed in a six-month or one-year camp or other placement. Counsel opined that a DJF commitment would not serve the minor's learning disabilities and educational needs.

The court inquired about the minor's behavior while confined in juvenile hall pending resolution of the petition. The probation officer revealed, "He has [had] four disobediences since last time he was in [court; between April 2 and May 1, 2009] and a unit fight on [April] 25th in which chairs were thrown, and he engaged in a fight with another youth." Defense counsel responded that the minor had been the victim of the chair throwing incident.

The juvenile court concluded that DJF was appropriate, reasoning as follows: "First of all, this is a [Welfare and Institutions Code section] 707(b) offense. Although the [previous] matter was dismissed per DEJ, [the minor] had just five days earlier had the DEJ dismissal on a first degree burglary when he was arrested for participation in the current actually two robberies. [¶] . . . [¶] The Court does think based on the seriousness of the facts of these cases that a DJ[F] commitment is appropriate for the reformatory, educational and counseling programs offered there for this minor. I think he will benefit. I think it is in his best interest. He is exhibiting out-of-control gang type behavior. I am going to go

into the facts a little bit more. But without proper discipline and realignment of his social and moral structure, I think he continues to possess a demonstrated threat to public safety. He needs intensive rehabilitation at this point that I don't think an at-home type environment or even a camp environment would be consistent with his best interest at this time."

After reviewing the facts of the minor's offenses, the juvenile court determined: "The behavior exhibited . . . is consistent with what we see in typical gang cases of coming to the assistance of fellow gang members or fellow associate gang members." The court noted that the minor had admitted that many of his friends are Norteño gang members and associates, and that the suspect who had wielded the knife during the February 23, 2009, robbery had told the victim that he was a Norteño. The court was concerned because the two robberies were so similar and because they occurred just a week apart. The court found: "This is very dangerous behavior exhibited toward members [of] the public [on the] street, during daylight hours, in this community."

The court concluded that a DJF commitment was warranted due to "the very serious nature of the crime." Specifically, a perpetrator used a knife in each robbery. The incidents appeared to be "a gang crime or arguably [] a gang situation based on the February robbery." The victims were strangers to the perpetrators who were "just randomly picked for being in the location at the particular time." There was "a callousness by the broad daylight nature of these robberies, and three

perpetrators each time engaging in these robberies even though there were two victims in the February incident."

On the issues of benefit to the minor and alternative placements, the court made the following finding: "I do believe the minor will receive probable benefit from the institution and treatment [at DJF], including education, anger management, gang awareness, as well as other treatment at [DJF]; and no other suitable alternatives exist for him at the local treatment level. [¶] I don't think that the camp or an extended stay at Juvenile Hall is appropriate in light of the dangerous situation of the gang involvement in our camp and hall. I think he possesses [*sic*] a continuing danger to society at this point, unless he is in fact confined, because of the heavy involvement with the gang lifestyle that appears to be exhibited by two separate situations bringing him to law enforcement attention. [¶] There is no proper programming in the hall as that is not set up for long-term commitments. [¶] [The] Court does find it is in the best interest of this minor for a [DJF] commitment at this time." The court found that the minor "has been tried on DEJ informal probation and failed to reform from delinquent behavior." It also found that the minor's mental and physical conditions rendered it probable that he would benefit from the reformatory and educational discipline and other treatment provided at DJF.

***Analysis***

"The decision of the juvenile court may be reversed on appeal only upon a showing that the court abused its discretion

in committing a minor to [DJF]. [Citations.] An appellate court will not lightly substitute its decision for that rendered by the juvenile court. We must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support them. [Citations.] In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law. [Citations.]" (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395; see *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) Those purposes include the "protection and safety of the public"; to that end, punishment is now recognized as a rehabilitative tool. (Welf. & Inst. Code, § 202, subds. (a), (b); *In re Asean D., supra*, at p. 473; *In re Michael D., supra*, at p. 1396.)

Section 734 provides: "No ward of the juvenile court shall be committed to [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by [DJF]."

Thus, "[t]o support a [DJF] commitment, it is required that there be evidence in the record demonstrating probable benefit to the minor . . . ." (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.) However, it is not necessary that less restrictive alternatives be attempted before a DJF commitment is ordered. (*In re James H.* (1985) 165 Cal.App.3d 911, 922.)

The minor contends there was "no clear evidence that the commitment would benefit" him and "no statements as to why a less restrictive placement is inappropriate." Due to this lack of evidence, the minor claims the DJF commitment "was made without determining whether the minor would benefit or whether less restrictive means were appropriate." None of these contentions has merit.

The clearest evidence of benefit emerged from the mouth of the minor. He told the probation department that "he will not accept being sent to a placement facility and that all he will do is run if he is sent to placement."[5] This statement illustrates the minor's evident belief that judicial placement orders somehow are his to accept or reject. The statement demonstrates the need for a secure facility that subordinates the minor to the law, not the law to the minor. There was substantial evidence that the minor would benefit from reformatory educational discipline and treatment in a secure setting that disempowered him from running and thus from rejecting, rather than accepting, the ordered treatment. (Cf. *In re Jonathan T.* (2008) 166 Cal.App.4th 474, 485 [minor needed a closed setting where he has "a history of running away"]; *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 153 [repeated escape attempts support DJF commitment]; *In re Martin L.* (1986)

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[5] At the contested hearing, defense counsel claimed the minor later "rethought that, recanted it and is not certain those are his exact words." The juvenile court was not bound to accept the claim of recantation.

187 Cal.App.3d 534, 544 [running away from two prior juvenile court placements supports DJF commitment].) This same evidence amply demonstrated that a less restrictive placement, which the minor could refuse to accept merely by running away, would be entirely inappropriate for him.

There was further evidence that less restrictive placements were inappropriate. The minor had an opportunity to benefit from less restrictive local treatment when he was placed on DEJ. Despite that opportunity, the minor committed one armed robbery three days before being released from DEJ and another armed robbery four days after his release. The seriousness of the crimes had escalated in that, unlike the burglary, the robberies were section 707, subdivision (b) offenses. Then in juvenile hall, the minor had four disobediences between the April 2 disposition hearing and the May 1 contested disposition hearing. The probation officer revealed that the minor had fought with another youth. The minor's history with less restrictive options demonstrated that they had been ineffective in controlling his delinquent behavior and thus were inappropriate.

Contrary to the minor's argument, the juvenile court *made* the determinations that he would benefit from DJF and that less restrictive means were not appropriate. The court found that the minor's mental and physical conditions were such as to render it probable that he would benefit from the reformatory and educational discipline and other treatment provided at DJF. It also found that the minor "has been tried on DEJ informal probation and failed to reform from delinquent behavior."

The minor contends he is "not the type of minor who belongs in DJF" because he "successfully completed" DEJ and is "not one who cannot successfully complete probation." This bold and brazen claim has no merit. The court deemed the minor's completion of DEJ "successful" only because it had been *unaware of the armed robbery committed three days before the underlying charges were dismissed.* The minor succeeded, not at his rehabilitation, but at shining a false light upon himself and inducing the court to act while unaware of the true facts.

The minor relies on cases that upheld DJF commitments where the severity of the delinquency had been greater, or where other less restrictive alternatives had failed, or where the court had given particular DJF programs more extensive consideration. The minor's reliance is misplaced. None of the cases established a factual "floor" below which DJF commitment is barred. None of them demonstrates any error in the present disposition. (See *In re Angela M.* (2003) 111 Cal.App.4th 1392, 1397; *In re Pedro M.* (2000) 81 Cal.App.4th 550, 556.)

The minor claims the court committed him to DJF "without the benefit of a complete and thorough social study" that would have "provide[d] information to the court about [DJF] so that the court may exercise informed discretion."

The minor's claim is not properly before us. Any objection to the contents of a probation report (here, an omission from a probation department social history report) is forfeited unless it is made in the juvenile court. (Cf. *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021; *People v. Wagoner* (1979)

89 Cal.App.3d 605, 616.) In the case on which the minor primarily relies, defense counsel objected to the lack of a required social studies report. (*In re L.S.* (1990) 220 Cal.App.3d 1100, 1103.)

In this case, defense counsel expressed a specific concern: the social history report contained no *finding* that a DJF commitment would be advantageous to the minor's rehabilitation.[6] The objection lacked merit because the report stated that at DJF the minor could "*obtain the services necessary to become a productive member of society*." (Italics added.) On appeal, the minor does not dispute that services "necessary to become a productive member of society" would be "advantageous" to his "rehabilitation."

Instead, on appeal, the minor makes a different claim: that the report was deficient for having failed to "educate the court about any DJF programs that might benefit" him. He reasons that such information was necessary to assure the court that it was operating on "hard evidence of what actually goes on" at DJF, rather than on "faith, institutional reputation or outdated information." This argument is forfeited because it was not asserted in the juvenile court.

In any event, the minor does not contend, and he has not attempted to show, that any DJF program to which the court

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[6] Counsel stated: "Now, in the [] report they do recommend [DJF]; however, *I see nothing in the report that shows any finding that it would be advantageous to him as far as rehabilitation*." (Italics added.)

alluded at disposition, i.e., "education, anger management, gang awareness, as well as other treatment," is no longer available at DJF. Under these circumstances, any claim of prejudice is conjectural and speculative. The minor's reliance on *In re L.S., supra*, 220 Cal.App.3d 1100, which held that *failure to file any social study report at all* is not amenable to harmless error analysis (*id.* at pp. 1106-1107), is entirely misplaced.

Finally, there is no merit to the minor's claim that the social history report failed to state why a less restrictive placement was inappropriate. The report stated that the minor had been tried on DEJ; all charges had been dropped; the minor had not appreciated the opportunity the court had conferred on him; he went on to commit more serious crimes listed in section 707, subdivision (b); he was an active participant in a crime that violated the victim's personal rights and caused him to fear for his life; he will not accept being sent to a placement facility; and, if sent to placement, all he would do is run. These remarks adequately demonstrate why any nonsecure placement would be inappropriate.

**II.**

The minor contends the juvenile court improperly exercised its discretion under section 731, subdivision (b), to set the maximum term of physical confinement "based upon the facts and circumstances of the matter." Specifically, he alleges when the court selected a maximum term of five years, it erroneously "did not orally pronounce the facts and circumstances it used to

determine why the upper term was appropriate." This claim overlooks the appellate record and has no merit.

***Background***

On March 18, 2009, the minor accepted the prosecution's offer wherein he admitted count 1, robbery (Pen. Code, § 211), and in exchange all remaining counts and allegations were dismissed. Before the plea was entered, the court inquired what the maximum term would be, and the prosecutor replied, "[f]ive years," with no aggregation. While advising the minor of his rights, the court asked, "Do you understand that if the Court takes jurisdiction, it may place you in a state or local facility or out-of-state for a maximum period of time of five years?" Defense counsel explained, "That is the worst that you could get." The minor replied, "Yes." In response to the court's questions, the minor indicated that he understood and that he did not have any questions. The minor admitted robbing J.S. on March 2, 2009, and the remaining allegations were dismissed with a *Harvey* waiver.

At the disposition hearing on May 1, 2009, the juvenile court committed the minor to DJF. As part of its oral pronouncement, the court stated: "Per [Welfare and Institutions Code section 731] and [*In re Jacob J.* (2005) 130 Cal.App.4th 429, 438, disapproved by *In re Julian R.* (2009) 47 Cal.4th 487, 499], the Court must set the maximum based upon the current status of the current cases; in this case the triad possible is two, three, or five. [¶] As I said, they are actually, when you look at the whole situation, was the -- there was the one

[Penal Code section] 211 that was admitted and then the second Harvey waived count of [Penal Code section] 211, very similar; appears to be random victims, use of weapon, that militates in favor of the upper term of five years as far as the Court setting the maximum based on the facts and circumstances."

The court concluded: "The Court at this time is finding upper term, five years will be the maximum confinement period and that is the only count." The court's signed DJF commitment form confirmed that it had considered the individual facts and circumstances of the case in determining the maximum period of confinement.

***Analysis***

"Section 731 sets two ceilings on the period of physical confinement to be imposed. The statute permits the juvenile court in its discretion to impose either the equivalent of the 'maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses' committed by the juvenile (§ 731, subd. (c)) or some lesser period based on the 'facts and circumstances of the matter or matters that brought or continued' the juvenile under the court's jurisdiction (*ibid.*)." (*In re Julian R., supra,* 47 Cal.4th at p. 498.)

In *Julian R.*, the minor argued for the first time in the Supreme Court that due process required the juvenile court to give a statement of reasons for its sentence choice, in committing him to DJF. *Julian R.* reasoned that, since the minor had failed to make the claim in the Court of Appeal or in his petition for review, he was precluded from raising the argument

before the Supreme Court. (*Julian R., supra*, 47 Cal.4th at p. 497, fn. 3.)

The minor makes the same argument here. However, in this case, the juvenile court orally pronounced a maximum term of five years and cited the facts and circumstances it considered in making its decision. Specifically, the court cited the minor's multiple robbery offenses, the similarity of the crimes, the fact the victims were picked randomly, and the use of a weapon in the robberies. The court concluded the "whole situation" "militates in favor of the upper term of five years as far as the Court setting the maximum based on the facts and circumstances." The court's written order committing the minor to DJF listed a maximum confinement period of five years and confirmed that the court had "considered the individual facts and circumstances of the case in determining the maximum period of confinement." It is not necessary to consider the minor's argument that due process compelled the court to do what it in fact did. There was no error.

**III.**

The minor contends, and the Attorney General concedes, the juvenile court erred when, after committing him to DJF, it ordered as conditions of probation that he not drive a motor vehicle unless properly licensed and insured; not possess or be around dangerous weapons; and have no contact with the victims. We accept the Attorney General's concession.

Once a minor is committed to DJF, supervision of the minor's rehabilitation becomes a function of DJF, not the

juvenile court. (*In re Allen N.* (2000) 84 Cal.App.4th 513, 515.) Following a DJF commitment, "the imposition of probationary conditions constitutes an impermissible attempt by the juvenile court to be a secondary body governing the minor's rehabilitation." (*Id.* at p. 516; see *In re Owen E.* (1979) 23 Cal.3d 398, 403-405; *In re Antoine D.* (2006) 137 Cal.App.4th 1314, 1325.) We shall order the discretionary probation conditions stricken.

**DISPOSITION**

The judgment is modified by striking the discretionary conditions of probation. As so modified, the judgment is affirmed. The juvenile court is directed to notify the Department of Justice that the minor is not subject to the weapons condition, and to prepare a corrected minute order and forward the order to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

RAYE, J.